

STATE OF MICHIGAN
COURT OF APPEALS

JAMES G. PATTY,

Plaintiff/Appellant-Cross-Appellee,

v

GRANGER CONSTRUCTION COMPANY,

Defendant/Third-Party

Plaintiff/Appellee-Cross-Appellant.

UNPUBLISHED

February 23, 2006

No. 263215

Isabella Circuit Court

LC No. 03-002686-NO

Before: Bandstra, P.J., and Fitzgerald and White, JJ.

BANDSTRA, P.J. (*concurring in part and dissenting in part*).

I agree with the majority's conclusion that the trial court order granting summary disposition under the open and obvious doctrine must be reversed pursuant to *Ghaffari v Turner Constr Co*, 473 Mich 16; 699 NW2d 687 (2005). However, I agree with the argument defendant raises on cross-appeal, that the trial court erred in concluding that a genuine issue of fact existed regarding application of the common work area doctrine. If that doctrine applies under the facts of this case, it is hard to imagine a job site situation where it would not apply. Thus, the common work area exception would swallow the general rule against general contractor liability. I would reverse the trial court's decision on that issue and affirm the grant of summary disposition in favor of defendant.

The common work area doctrine is an exception to the usual rule that property owners and general contractors cannot be held liable for the negligence of independent subcontractors and their employees. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). For defendant to be held liable under this exception, plaintiff must show, among other things, that a danger on the job created a high degree of risk to "a significant number of workmen." *Id.* at 54. I would conclude that plaintiff failed to establish a question of fact whether the two-by-six from which he fell created risk to a significant number of workers.

This Court has concluded that, where only four men were exposed to a risk, the defendant had "not breach[ed] its duty to guard against a danger posing a 'high degree of risk to a significant number of workmen.'" *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 8; 574 NW2d 691 (1997), quoting *Funk v Gen Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974). In reaching this conclusion the Court distinguished *Funk* and its progeny:

Liability was imposed on the general contractor in *Funk* because Funk fell from a highly visible superstructure that . . . posed a risk to thousands of other workers. In *Funk*, the Court employed a risk analysis, finding that liability should not be imputed unless the dangers in the work area involve “a *high degree* of risk to a *significant number* of workers.” *Funk, supra* at 104 (emphasis added). See *Plummer v Bechtel Constr Co*, 440 Mich 646, 651; 489 NW2d 66 (1992) (the plaintiff fell from an interconnecting catwalk/platform system at a construction project involving 2,500 workers and a number of subcontractors); *Erickson [v Pure Oil Corp]*, 72 Mich App 330, 337; 249 NW2d 411 (1976), abrogated on other grounds in *Ormsby, supra*] (the plaintiff fell from a roof used by numerous subcontractors when he slipped on oiled metal roof sheets). [*Hughes, supra* at 7.]

Similarly, our Supreme Court has noted that the fact that a plaintiff and one other worker were exposed to an alleged risk does not establish a genuine issue of fact regarding a high degree of risk to a *significant* number of workers. *Ormsby, supra* at 59 n 12 (emphasis in original). In contrast, our Supreme Court has held that a genuine issue of material fact existed where a plaintiff alleged that most or all the workers on a jobsite passed along a driveway directly beneath an allegedly dangerous power line. *Groncki v Detroit Edison Co*, 453 Mich 644, 664; 557 NW2d 289 (1996).

Here, the record is uncontested that the stairway system from which plaintiff fell was located in a small mechanical room that could be accessed from within the building only through a classroom. Accordingly, no one worked in or traveled over the stairway system on the main construction shift during the regular school day because such activity would have disrupted classes.

Plaintiff’s accident occurred when he was working on the stair system with one co-worker, during the second or evening shift, around 5:00 p.m. He testified at his deposition that his company was exclusively involved in the stairway project and that no one else was there at the time. He further testified that “some masons and roofers” used the stairs as they were coming off their shift, presumably after working on the roof outside of the emergency egress window in the mechanical room. However, plaintiff did not specify how many workers used that route. Further, whatever number of other workers used the stairway in this fashion could only have done so during the limited part of the work day before or after the classroom was in use. The evidence showed that the roof could be accessed from outside the building as well as through the mechanical room.

Plaintiff asserts on appeal that approximately five electricians and 16 masons used the stairs and landing to gain access to the roof. However, this assertion is simply not supported by specific facts in the record. Plaintiff testified he observed “other trades” using the stairway to gain access to the roof, and defendant’s employees agreed that some other trades may have used the stairway to access the roof. Defendant’s work records indicate the number of workers generally employed on the large jobsite on the day of plaintiff’s accident, but do not clearly indicate where the workers were located. Plaintiff conflates testimony that masons and electricians may have worked on the roof with defendant’s daily project report to conclude that five electricians and 16 masons were exposed to the alleged dangerous condition. However, there is no evidence that all or even some of these workers used the stairway. Defendant’s employee estimated that, out of 160 construction workers on site, approximately one or two

would have occasion to be working on the roof. Further, this employee did not testify that he observed other workers using the stairway.

I conclude that plaintiff has failed to provide specific facts or evidence indicating that a significant number of workers were exposed to the risk presented by the two-by-six. Plaintiff's failure to produce evidence sufficient to establish a genuine issue on that element of the common work area exception is fatal to his claim against defendant.¹ *Ormsby, supra* at 59. I would affirm the grant of summary disposition in favor of defendant. See, e.g., *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 354; 686 NW2d 756 (2004) (a trial court order will not be reversed "if the court reached the right result for the wrong reason").

/s/ Richard A. Bandstra

¹ Because access to the mechanical room and stairwell was limited as described above, I also question whether plaintiff has established a genuine issue whether the accident occurred in a common work area, another necessary element of his claim. *Ormsby, supra* at 57.